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11 **IN THE UNITED STATES DISTRICT COURT**  
12 **FOR THE WESTERN DISTRICT OF WASHINGTON**

13 WASHINGTON TOXICS COALITION,  
14 NORTHWEST COALITION FOR  
ALTERNATIVES TO PESTICIDES,  
15 PACIFIC COAST FEDERATION OF  
FISHERMEN'S ASSOCIATIONS, and  
INSTITUTE FOR FISHERIES RESOURCES,

16 Plaintiffs,

17 vs.

18 ENVIRONMENTAL PROTECTION AGENCY,  
19 and STEPHEN L. JOHNSON, Acting Administrator)

20 Defendants,

21 and

22 AMERICAN CROP PROTECTION ASS'N, *et al.*,

23 Intervenor-Defendants.  
24

) Case No. C01-0132 C

) **OPPOSITION TO PLAINTIFFS'**  
) **MOTION FOR RELIEF FROM**  
) **DEADLINE FOR FILING**  
) **DOCUMENTATION**

) NOTED ON MOTION CALENDAR:  
) APRIL 6, 2005

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26  
27 Opposition to Plaintiffs' Motion  
For Relief from Deadline for  
Filing Documentation  
28 Case No. 01-0132C

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## I. INTRODUCTION

Two business days after filing their reply brief seeking to modify the Court's July 2, 2002 injunction, Plaintiffs submitted to the Court a pleading entitled "Motion for Relief from Deadline for Filing Documentation Supporting Reply in Support of Plaintiffs' Motion to Modify July 2, 2002 Order." The declaration and accompanying seven exhibits attached to that motion attempt to introduce evidence that has been within Plaintiffs' possession for over *nine months*, yet was not filed with the original motion. Moreover, it is unclear what, if any, connection the documents have to the arguments in Plaintiffs' briefs. Defying the very reason that courts do not permit the introduction of new evidence on reply briefs (or subsequent to the reply brief, as in this case), Plaintiffs suggest that none of the other parties would be prejudiced should the Court allow this untimely filing, because "no other party has the right to submit additional briefing on this motion." Plaintiffs' Motion at 2. This is precisely *why* the law prohibits introduction of new evidence on replies. Even more incredibly, Plaintiffs attempt to justify their delinquent submission by stating that Plaintiffs' own staff scientist – who had these materials in her possession, at the very latest, since June 2004 – did not provide them to Plaintiffs' counsel until hours after the reply brief had been filed, and "[is] not in the office on Fridays." Second Schreder Decl. at 4.

Such litigation gamesmanship should not be allowed, and the Court should deny the instant motion. Alternatively, if the Court is willing to consider Plaintiffs' March 28, 2005 submissions, Defendants respectfully request the opportunity to file a surreply to address the information contained in Plaintiffs' late-filed materials.

## II. ARGUMENT

### A. Plaintiffs May Not Introduce New Evidence In Their Reply Brief

In seeking to submit this new evidence in conjunction with their reply brief,

1 Plaintiffs state that “[n]o party will be prejudiced by this delayed filing since the  
2 documents support plaintiffs’ reply brief and no other party has the right to submit  
3 additional briefing on this motion.” Plaintiffs’ Motion at 2. Yet, this proposition flies in  
4 the face of the well-established law of this circuit.

5 The Ninth Circuit has made clear that litigants may not raise new issues in their  
6 reply briefs. See United States v. Rewald, 889 F.2d 836, 854 (9th Cir. 1989) (“Moreover,  
7 ‘appellants cannot raise a new issue ... in their reply briefs.’”) (citing Golden v. Pacific  
8 Maritime Ass’n, 786 F.2d 1425, 1429 (9th Cir. 1986)). The courts have noted that “[s]uch  
9 a result would be unfair.” Provenz v. Miller, 102 F.3d 1478, 1483 (9<sup>th</sup> Cir. 1996); see  
10 also, Mountain States Legal Found. v. Espy, 833 F. Supp. 808, 813 n.5 (D. Idaho 1993)  
11 (deeming claims not raised in summary judgment motion abandoned and granting  
12 judgment for defendants); Competitive Technologies v. Fujitsu Ltd., 286 F. Supp. 2d  
13 1118, 1139 (N.D. Cal. 2003) (“It is improper to raise in reply a series of arguments that  
14 amount to an entirely new, unfiled motion.”); United States v. Boyce, 148 F. Supp. 2d  
15 1069, 1085 (S.D. Cal. 2001) (“This argument was not presented in their moving papers  
16 and therefore should not be considered now, as it is improper for a party to raise a new  
17 argument in a reply brief.”) (citing United States v. Bohn, 956 F.2d 208, 209 (9th  
18 Cir.1992)).<sup>1/</sup>

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20 <sup>1</sup> The Federal Rules of Civil Procedure similarly provide that “when a motion is supported by  
21 affidavit, the affidavit shall be served *with the motion*.” Fed. R. Civ. P. 6(d) (emphasis  
22 added). Courts have recognized that under the Federal Rules, “*all* affidavits in support of  
23 a motion must be submitted with the motion unless the court, for cause shown, permits a  
24 later filing.” RepublicBank Dallas, N.A. v. First Wis. Nat’l Bank of Milwaukee, 636  
25 F.Supp. 1470, 1472 (E.D.Wis.1986) (emphasis added). See also Peters v. Lincoln Elec. Co.,  
26 285 F.3d 456, 476 (6th Cir.2002). Compliance with Rule 6(d) is necessary to avoid unfair  
disadvantage to the non-moving party by introducing evidence to which the non-movant will  
have no opportunity to respond. The purpose of the Rule 6 requirement that cause be shown  
for affidavits not attached to the original motion “is to prevent the moving party from  
springing new facts on the nonmoving party when it is too late to contest them.”  
Owner-Operator Independent Drivers Ass’n, Inc. v. Arctic Express, Inc., 288 F.Supp. 2d 895,  
903 (S.D. Oh. 2003) (citing Peters, 285 F.3d at 476). See also Orsi v. Kirkwood, 999 F.2d

1 Here, Plaintiffs have not identified any issue in their opening motion (or reply  
2 brief) to which these additional materials specifically relate. Plaintiffs have not even  
3 bothered to explain the documents' connection to the original Motion to Modify, and it is  
4 neither the role of this Court nor the Defendants to sift through these documents to attempt  
5 to glean what arguments they purportedly support. However, these freestanding  
6 documents appear to comprise new evidence regarding the sufficiency of EPA's pesticide  
7 consultations. Whatever their connection to the arguments in Plaintiffs' briefs, it is  
8 wholly improper for them to be submitted two days after Plaintiffs filed their reply.  
9 Consistent with Ninth Circuit law, the Court should reject Plaintiffs' untimely submission  
10 of this new evidence.

11 **B. Plaintiffs Have Not Shown Cause to Permit the Untimely Submission of these**  
12 **Materials**

13 Setting aside the fact that the submission of new evidence with the reply brief is  
14 improper (not to mention post-reply brief evidentiary submissions, as in this case),  
15 Plaintiffs' explanation for their untimely submission cannot be countenanced. Plaintiffs  
16 attempt to justify their conduct by pinning the responsibility on Plaintiffs' own employee,  
17 Erika Schreder. Plaintiffs state that they are entitled to relief "because the declarant  
18 provided the supporting documents to counsel after the close of business on Thursday,  
19 March 24, 2005, the day the reply brief was due and the declarant was not in the office on  
20 Friday, March 25, 2005. Accordingly, [March 28, 2005] is the first business day on which  
21 [Plaintiffs] could submit the supporting documentation to the Court." Pls' Motion at 2.

22 Even a cursory review of the declaration and accompanying materials reveal that  
23 this explanation cannot be accepted. Notably, Ms. Schreder is not an outside party, but an

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25 86, 91 (4th Cir.1993); McGinnis v. Southeast Anesthesia Assocs., P.A., 161 F.R.D. 41, 42  
26 (W.D. N.C. 1995) ("[A] party may not file a motion unsupported by any evidence only to  
spring the evidence on the opposing party on a later date.")

1 employee of the Plaintiff itself. Ms. Schreder received the documents in question by way  
2 of two FOIA transmittals on May 12, 2004 and June 29, 2004. Pls' Exh. 1 at 1, Pls' Exh.  
3 2 at 1.

4 Nonetheless, Plaintiffs suggest that she was unable to provide the documents to  
5 Plaintiffs' counsel until "after the close of business on ... the day the reply brief was due."  
6 Pls' Motion at 2. Specifically, Ms. Schreder misleadingly explains that "I did not provide  
7 them the cover letters or the other responsive documents until the close of business  
8 Thursday, March 24, 2005. Because I am not in the office on Fridays, *today is the first*  
9 *day I could submit the additional documents to the Court.*" Second Schreder Decl. at 4  
10 (emphasis added). Neither Ms. Schreder nor Plaintiffs' counsel explain why she could not  
11 have provided these documents to her attorneys' office during any of the preceding 268  
12 days that had elapsed since the final set of FOIA documents were transmitted.

13 Plaintiffs have wholly failed to demonstrate any good cause why these untimely  
14 filed documents should be considered on the underlying motion, and as such, the instant  
15 motion for relief should be rejected.

16 **C. In the Alternative, Defendants Request the Right to File a Surreply**

17 In the event that the Court, is willing to consider Plaintiffs' late-filed documents,  
18 Defendants respectfully request the opportunity to file a surreply to address this new  
19 evidence. Courts have made clear that belated filings similar to that attempted by  
20 Plaintiffs here should not be considered unless the opposing party is given the opportunity  
21 to respond. See, Provenz, 102 F.3d at 1483 ("where new evidence is presented in a reply  
22 to a motion for summary judgment, the district court should not consider the new evidence  
23 without giving the non-movant an opportunity to respond"); see also, Minnesota Power &  
24 Light Co. v. Hockett, 105 F.Supp. 2d 939, 946 (S.D. Ind. 1999) ("arguments or evidence  
25 first presented in reply either should not be considered or the opposing party should be  
26

1 allowed an opportunity to respond.”)

2 **CONCLUSION**

3 WHEREFORE, for the foregoing reasons, Plaintiffs’ Motion for Relief from  
4 Deadline should be DENIED. Alternatively, if the Court is willing to consider Plaintiffs’  
5 March 28, 2005 submissions, Defendants respectfully request the opportunity to file a  
6 surreply.

7 Respectfully submitted,

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